

May 14, 2003

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND RECOMMENDATION TO THE METROPOLITAN KING COUNTY COUNCIL

SUBJECT: Department of Natural Resources, Water and Land Resources Division File No. **E02CT002**
Proposed Ordinance No. **2003-0062**

Open Space Taxation (Public Benefit Rating System)
Application of **Palmer Coking Coal Company**
P. O. Box 10
Black Diamond, WA 98010

Location of Property: 26416, 26410, 26422 & 26428 Kent-Kangley Road Southeast
Ravensdale, Washington

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary:	Approve 15.88 acres for 20% of market value
Department's Final:	Approve 15.88 acres for 20% of market value
Examiner:	Approve 15.88 acres for 30% of market value

PRELIMINARY REPORT:

The Department of Natural Resources, Water and Land Resources Division Report on Item No. E02CT002 was received by the Examiner on March 26, 2003, and followed by a revised report received on April 23, 2003.

PUBLIC HEARING:

After reviewing the Department of Natural Resources, Water and Land Resources Division Report and examining available information on file with the application, the Examiner conducted a public hearing on the subject as follows:

The hearing on item no. E02CT002 was opened by the Examiner at 9:50 a.m., April 2, 2003, in the Fifth Floor Conference Room, Union Bank of California Building, 900 Fourth Avenue, Seattle, Washington. The hearing was administratively continued to April 30, 2003, and closed at 2:30 p.m.

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & RECOMMENDATION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Owner: See "SUBJECT" above

Location: See "SUBJECT" above

PBRS Resources Requested: HIGH PRIORITY RESOURCES
 Aquifer protection area
 Surface water quality buffer area
 Open space close to urban or growth area
 Significant plant, wildlife or salmonid habitat area
 Forest stewardship land
BONUS RESOURCE
 Contiguous parcels under separate ownership
PUBLIC ACCESS
 Limited access (seasonal and/or upon special arrangements)

Zoning: RA5

	Lot A	Lot B	Lot C	Lot D
Parcel	#252206-9009	#252206-9047	#252206-9060	#252206-9142
Total acreage:	6.19	5.73	6.19	6.05
Requested for PBRS:	4.40	4.10	4.90	4.60
Revised recommended:	4.35	3.66	4.10	3.77

Please note: The property is 24.17 acres. The requested PBRS area is 18.00 acres. The recommended acreage, 15.88 acres, is dependent on the implementation of an approved restoration plan. The applicant must provide an acceptable map delineating the excluded areas prior to the completion of a formal legal description and open space taxation agreement.

STR: NE-SW-25-22-06

2. Except as modified herein, the facts set forth in the King County Department of Natural Resources, Water and Land Resources Division preliminary report to the King County Hearing Examiner for the April 2, 2003, public hearing (April 30, 2003, revision) are found to be correct and are incorporated herein by this reference. Copies of the said report will be attached to the copies of this report submitted to the King County Council.

3. Palmer Coking Coal owns 24.17 acres of sloping rural property located north of Ravensdale, approximately one mile east of Maple Valley. The lower portions of the property are dominated by pasture grasses, while the steeper upper regions are timbered with mature hardwood and young Douglas fir. The property has been segregated into four residential parcels with homes, driveways and septic systems recently sited on the lower portions of the parcels and the upper portions retained in timbered open space.
4. The public hearing on this application was opened on April 2, 2003. The testimony on the application identified certain key disagreements between Ted Sullivan, the Water and Land Resources Division staff representative, and William Kombol, manager of the Palmer Coking Coal, Company. As a result, the hearing was continued to April 30, 2003, to allow the parties further opportunity to research the matters at issue. Palmer Coking Coal has requested approval of 18 acres for inclusion in the PBRs program. Staff originally recommended approval of 17.69 acres, which figure was revised downward to 15.88 acres at the April 30, 2003, hearing. At both sessions, staff recommended that PBRs credit be dependent categorically upon implementation of a plan to control invasive vegetation on the property. Without such plan, the staff recommendation is that no acreage should qualify for PBRs approval and the application should be denied.
5. The forested portions of the Palmer property presently comprise 11.23 acres. Mr. Sullivan has estimated that invasive species control is required on another 4.65 acres, about 2 acres of which falls within a BPA easement right-of-way. A further approximately two acres of pasture grass lies within the proposed expanded stream buffers adjacent to a tributary of Rock Creek that has been identified as a salmonid bearing stream. In addition, the forested areas have been identified as habitat for elk and pileated woodpecker.
6. On a regulatory level, a portion of a County-designated wildlife habitat network crosses the northern portion of lots A and B, and the entire property falls within the Soos Creek Basin Wellhead Protection Area. In conjunction with the residential development of the lots, Palmer has opted under the County's Surface Water Design Manual to qualify for the forested open space exemption for rural residential projects. Under this exemption, in lieu of providing on-site drainage facilities, Palmer has dedicated 65% of the site's natural drainage area to be set aside as forested open space and to disperse surface water runoff to that area.
7. The site also has a history of equestrian and hiking trail use. The Applicant's forest stewardship plan states that the "landowner allows permissive hiking and horseback riding on the site via an existing horse trail as shown on the Timber Type Map." Looking at the timber map and referencing it to the residential development site plans submitted by the Applicant, one observes that the horse trail runs north from the Kent-Kangley Road across the driveway to lot D, then across the salmonid stream and the driveway and well protection zone for lot C, then north through the timbered area along a course adjacent to and west of the stream.
8. Palmer Coking Coal Company owns a substantial amount of acreage in the Ravensdale area, and the trail use access permits submitted to the record to document public use tend to be generic in their descriptions. Thus, according to the permit record Palmer has allowed access to trails and roads in the vicinity of Lake Sawyer, Ravensdale, Landsburg, Fish Lake and Franklin Hill. The only permit specific to the property covered by the application is one that was issued for September 9, 2001 to the Backcountry Horsemen of Washington, Inc., for portions of section 24

and 25, township 22 north, range 6 east. The map attached to the permit shows a tract of more than 100 acres, of which the Applicant property comprises the southern 20%.

CONCLUSIONS:

1. There are three issues raised by this application. The first is, whether for purposes of determining a surface water quality buffer area, the Applicant can only receive credit if the buffer being provided exceeds the 65% dedicated as a native growth retention area for the dispersion of drainage runoff. The second question is whether staff can require an invasive species control plan as a condition precedent to allowing any PBRS credit for the qualifying resources on the property. The third question is whether trail facilities on the property qualify for limited public access credit.
2. The first of these questions is probably the easiest to answer. The requirements and resources attachment to Ordinance no. 12969 states that among the open space areas being considered for PBRS credit, those open space areas “required by zoning and other land use regulation” and buffer areas “required as part of a development, subdivision, zoning, or other regulatory requirement” are ineligible for PBRS credit unless the amount of buffer or open space area offered by the applicant significantly exceeds the quantity set aside pursuant to the regulatory scheme. Mr. Kombol argues that his 65% native growth retention area should not be considered a regulatory exaction because it is a voluntary set aside provided in lieu of more intensive development of drainage facilities. Mr. Sullivan’s position is that all regulatory development limitations are ineligible *per se* for PBRS credit under the program.
3. From a purely logical standpoint, Mr. Kombol’s position is the more compelling. The purpose of the PBRS program is to preserve open space by rewarding land owners who refrain from maximizing development on their property. Under Mr. Sullivan’s theory, the opposite effect is obtained. If Palmer more intensively develops its property by installing drainage facilities, it receives a tax benefit that is denied it by opting for less intensive development under the retention easement alternative. Fortunately, the logic of Mr. Kombol’s position is also evidenced within the 1998 Surface Water Design Manual. Manual section 5.2.1 deals with implementation of the forested open space alternative and at page 5-14 reads in pertinent part as follows:

“The forested open space must be placed in a separate tract or protected through recorded easements on the individual lots. Open space on individual lots can be established through conservation easements, with tax benefits available through the Public Benefit Rating System program.”

It is clear, therefore, that the Water and Land Development Division in proposing and the County Council in adopting the 1998 Surface Water Design Manual did not intend that dedication of property under the forested open space exemption alternative should deprive the property owner of PBRS credit.

4. Mr. Sullivan argues that requiring an invasive control plan as a precondition for qualifying a property for PBRS approval is a long-standing policy of the Water and Land Development Division. He acknowledges that this policy has no basis in the ordinance. The relevant ordinance provisions are found at KCC 20.36.100:

- “A. To be eligible for open space classification under the public benefit rating system, property must contain one or more priority open space resources.Complete definitions of each resource, sources and eligibility standards are fully described in the summary report adopted by reference by KCC 20.36.150. The Department of Natural Resources and Parks shall have administrative authority to interpret issues relating to the priority resource definitions and eligibility standards outlined in the summary report.”
5. The ordinance is explicit that the only criterion for PBRS eligibility is the existence on the property of a priority open space resource. It is inconsistent with the ordinance language for staff to create a categorical requirement for submission of an invasive species control plan. Such a plan may be a requirement for one or another specific resource category, but there are clearly many categories whose viability are not compromised by the presence of invasive plant species. For example, within the present application, the open space close to urban or growth area; significant plant, wildlife or salmonid habitat area; contiguous parcels under separate ownership; and limited access categories are all subject to award under the adopted eligibility criteria without reference to the control of invasive species.
6. On the other hand, there are also categories within Palmer’s application for which the resource award is dependent upon instituting an invasive species control plan. The aquifer protection area classification requires either native growth or a plan for revegetation. The surface water quality buffer area requires an undisturbed zone of native growth vegetation adjacent to the protected amenity. Invasives control may be logically inferred as a management requirement under a forest stewardship land plan, and an otherwise qualifying special animal site may be excluded if it is a highly disturbed remnant natural area. For all of these categories, removal of invasive species and their replacement with native vegetation can be reasonably interpreted as an eligibility criterion for qualification for PBRS credit. Thus for the Applicant to receive credit for all the categories recommended on the entire 15.88 acres of open space, an invasives control and natural vegetation planting plan must be implemented.
7. Finally, staff has vacillated on whether the Applicant qualifies for limited access credit based on the occasional permitted public use of the horse trail across the property. Our view is that credit for this category should not be awarded. First, the trail identified by the Applicant has been seriously compromised as to its usefulness by recent residential development on the property. Second, and more fundamentally, the public access category is not designed to provide PBRS credit for trail linkages. Such credit is provided elsewhere in the program for dedicated linkages at KCC 20.36.105 and under the trail linkage resource category. Rather, the public access category is designed to confer credit where public access is being provided to an appropriate resource attraction on the property. For example, if a property contains a resource such as a recreational area, a scenic viewpoint, a significant geological feature or historic landmark, then access to such feature would qualify for the public access credit. This limitation is identified within the requirements and resources text within the following cryptic note:

“Public access bonus points are granted to categories that require public access.”

Approval of public access points for a lower level trail linkage is not consistent with the intent of the category.

8. Approval of current use valuation for 15.88 acres of the subject property, pursuant to the Public Benefit Rating System adopted by King County Ordinance No. 10511, as amended, would be consistent with the purposes and intent of King County to maintain, preserve, conserve and otherwise continue in existence adequate open space lands and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of King County and its citizens.
9. Timely application has been made to King County for the current use valuation of the subject property to begin in 2004. Notice of said application was given in the manner required by law.
10. The subject property contains priority open space resources and is entitled to bonus points pursuant to the King County Public Benefit Rating System, which justify a total award of 18 points. The resulting current use value is 30% of market value for 15.88 acres of the subject property.

RECOMMENDATION:

APPROVE the request for current use valuation of 30% of market value for 15.88 acres of the subject property, subject to the conditions recommended in the Department of Natural Resources report for the April 30, 2003, public hearing, and the following additional conditions of approval:

1. A plan for control and removal of invasive species and the replanting of such areas with native vegetation shall be submitted to the Water and Land Resources Division staff by September 1, 2003, and approved by staff by October 1, 2003. Failure to meet this deadline shall result in limiting the area qualifying for open space enrollment to the timbered portions only (11.23 acres) and eliminating the surface water quality buffer award on lots C and D. The Applicant shall be provided with the flexibility to design an invasive species control plan for the BPA easement the terms of which are consistent with BPA easement restrictions and maintenance practices.
2. Condition no. 9 of the Department of Natural Resources report is deleted.
3. If in the future either lots C or D of the property are conveyed to separate ownership, such lots shall no longer qualify for the special animal site award.

Current use valuation shall be subject to all terms and conditions of RCW 84.34 and King County Code Chapter 20.36, as the same may be amended from time to time, and all regulations and rules duly adopted to implement state law and county ordinances pertaining to current use valuation.

RECOMMENDED this 14th day of May, 2003.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 14th day of May, 2003, to the following parties and interested persons:

Palmer Coking Coal Co.
POB 10
Black Diamond, WA 98010

Ted Sullivan, Department of Natural Resources
Susan Monroe, Department of Assessments
Charlie Sundberg, Office of Cultural Resources

**NOTICE OF RIGHT TO APPEAL
AND ADDITIONAL ACTION REQUIRED**

In order to appeal the decision of the Examiner, written notice of appeal must be filed with the Clerk of the King County Council with a fee of \$250.00 (check payable to King County Office of Finance) ***on or before May 28, 2003***. If a notice of appeal is filed, the original and six (6) copies of a written appeal statement specifying the basis for the appeal and argument in support of the appeal must be filed with the Clerk of the King County Council ***on or before June 4, 2003***. Appeal statements may refer only to facts contained in the hearing record; new facts may not be presented on appeal.

Filing requires actual delivery to the Office of the Clerk of the Council, Room 1025, King County Courthouse, 516 3rd Avenue, Seattle, Washington 98104, prior to the close of business (4:30 p.m.) on the date due. Prior mailing is not sufficient if actual receipt by the Clerk does not occur within the applicable time period. The Examiner does not have authority to extend the time period unless the Office of the Clerk is not open on the specified closing date, in which event delivery prior to the close of business on the next business day is sufficient to meet the filing requirement.

If a written notice of appeal and filing fee are not filed within fourteen (14) calendar days of the date of this report, or if a written appeal statement and argument are not filed within twenty-one (21) calendar days of the date of this report, the decision of the hearing examiner contained herein shall be the final decision of King County without the need for further action by the Council.

Action of the Council is final. The action of the Council on a recommendation of the Examiner shall be final and conclusive unless within twenty-one (21) days from the date of the action an aggrieved party or person applies for a writ of certiorari from the Superior Court in and for the County of King, State of Washington, for the purpose of review of the action taken.

MINUTES OF THE APRIL 2 and 30, 2003 PUBLIC HEARING ON DEPARTMENT OF NATURAL RESOURCES FILE NO. E02CT002

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Ted Sullivan, representing the Department; and William Kombol, representing the Applicant.

The following exhibits were offered and entered into the record:

Exhibit No. 1	Not submitted
Exhibit No. 2	Not submitted
Exhibit No. 3	Not submitted
Exhibit No. 4	PBRS staff report
Exhibit No. 5	Affidavit of Publication – indication publication date of 2/26/03

Exhibit No. 6	Notice of hearing from the Office of the Hearing Examiner dated March 11, 2003
Exhibit No. 7	Notice of hearing from the PBRS Program date March 24, 2003
Exhibit No. 8	Legal notice and introductory ordinance to Council
Exhibit No. 9	Application – signed and notarized on June 11, 2002
Exhibit No. 10	Letter to Applicant regarding received application and approval schedule
Exhibit No. 11	Not submitted
Exhibit No. 12	King County Assessor's database
Exhibit No. 13	Arcview map with orthophoto
Exhibit No. 14	Site map with topography
Exhibit No. 15	Forest Stewardship Plan dated June, 2002
Exhibit No. 16	Email dated March 27, 2003, regarding restoration questions and area
Exhibit No. 17	Copies of previous user access permits
Exhibit No. 18	Facsimile sent March 31, 2003, regarding access support from user
Exhibit No. 19	Facsimile sent March 31, 2003, regarding history of the property
Exhibit No. 20	Copy/example of limited access permit
Exhibit No. 21a	Native growth retention area covenant – Lot A
21b	Native growth retention area covenant – Lot B
21c	Native growth retention area covenant – Lot C
21d	Native growth retention area covenant – Lot D
Exhibit No. 22a	Sensitive areas notice – Lot A
22b	Sensitive areas notice – Lot B
22c	Sensitive areas notice – Lot C
22d	Sensitive areas notice – Lot D
Exhibit No. 23a/b	Photos (2) of subject property taken March, 2003, by W. J. Kombol

The following exhibits were offered and entered into the record at the April 30, 2003, continued hearing:

Exhibit No. 4A	Revised staff report dated April 30, 2003
Exhibit No. 24a-m	Photos (13) of subject property taken by W. J. Kombol

SLS:ms
E02CT002 2003-0062 RPT

Attachment

This document is provided for information only. DO NOT complete and return. A completed copy will be furnished to the Applicant(s) by the Office of the Hearing Examiner after an application has been approved by the Metropolitan King County Council.

OPEN SPACE TAXATION AGREEMENT

Chapter 84.34 RCW

(To be used for "Open Space", "Timber Land" Classification or "Reclassification" Only)

Owner(s) _____

Granting Authority _____

Legal Description _____

Assessor's Property Tax Parcel or Account Number _____

Department of Natural Resources File Number _____

This agreement between _____

hereinafter called the "Owner", and _____

hereinafter called the "Granting Authority".

Whereas the owner of the above described real property having made application for classification of that property under the provisions of Chapter 84.34 RCW.

And whereas, both the owner and granting authority agree to limit the use of said property, recognizing that such land has substantial public value as open space and that the preservation of such land constitutes an important physical, social, esthetic, and economic asset to the public, and both parties agree that the classification of the property during the life of this agreement shall be for:

Open Space Land

Now, therefore, the parties, in consideration of the mutual covenants and conditions set forth herein, do agree as follows:

1. During the term of this agreement, the land shall be used only in accordance with the preservation of its classified use.
2. No structures shall be erected upon such land except those directly related to, and compatible with, the classified use of the land.
3. This agreement shall be effective commencing on the date the legislative body receives the signed agreement from the property owner and shall remain in effect until the property is withdrawn or removed from classification.
4. This agreement shall apply to the parcels of land described herein and shall be binding upon the heirs, successors and assignees of the parties hereto.
5. **Withdrawal:** The landowner may withdraw from this agreement if, after a period of eight years, he or she files a request to withdraw classification with the assessor. Two years from the date of that request the assessor shall withdraw classification from the land, and the applicable taxes and interest shall be imposed as provided in RCW 84.34.070 and 84.34.108.
6. **Breach:** After the effective date of this agreement, any change in use of the land, except through compliance with items (5), (7), or (9), shall be considered a breach of this agreement, and shall be subject to removal of classification and liable for applicable taxes, penalties, and interest as provided in RCW 84.34.080 and RCW 84.34.108.

7. A breach of agreement shall not have occurred and the additional tax shall not be imposed if removal of classification resulted solely from:
 - a) Transfer to a governmental entity in exchange for other land located within the State of Washington.
 - b) A taking through the exercise of the power of eminent domain, or sale or transfer to an entity having the power in anticipation of the exercise of such power and having manifested its intent in writing or by other official action.
 - c) A natural disaster such as a flood, windstorm, earthquake, or other such calamity rather than by virtue of the act of the land owner changing the use of such property.
 - d) Official action by an agency of the State of Washington or by the county or city where the land is located disallowing the present use of such land.
 - e) Transfer of land to a church when such land would qualify for exemption pursuant to RCW 84.36.020.
 - f) Acquisition of property interests by State agencies or agencies or organizations qualified under RCW 84.34.210 and 64.04.130 (See RCW 84.34.108(5)(f)).
 - g) Removal of land classified as farm and agricultural land under RCW 84.34.020(2)(d).
 - h) Removal of land from classification after enactment of a statutory exemption that qualifies the land for exemption and receipt of notice from the owner to remove the land from classification.
 - i) The creation, sale, or transfer of forestry riparian easements.
 - j) The creation, sale, or transfer of a fee interest or a conservation easement for the riparian open space program under RCW 76.09.040.
8. The county assessor may require an owner to submit data relevant to continuing the eligibility of any parcel of land described in this agreement.
9. Reclassification as provided in Chapter 84.34 RCW.

This agreement shall be subject to the following conditions:

It is declared that this agreement specifies the classification and conditions as provided for in Chapter 84.34 RCW and the conditions imposed by this Granting Authority. This agreement to tax according to the use of the property may be annulled or canceled at any time by the Legislature.

Granting Authority:

Dated _____

City or County

Title

As owner(s) of the herein-described land I/we indicated by my/our signature(s) that I am/we are aware of the potential tax liability and hereby accept the classification and conditions of this agreement.

Owner(s)

Dated _____

(Must be signed by all owners)

Date signed agreement received by Legislative Authority _____

To inquire about the availability of this notice in an alternative format for the visually impaired or in a language other than English, please call (360) 753-3217. Teletype (TTY) users may call (800) 451-7985.